(2)

Supreme Court, U.S.
FILED
FEB 19 1997
CLERK

No. 96-1146

In The
Supreme Court of the United States

October Term 1996

VEMCO, INC.,

a Michigan corporation,

Petitioner,

vs.

FEDERAL INSURANCE COMPANY,

a New Jersey corporation,

Respondent.

On Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The Sixth Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

R. DICKEY HAMILTON
COUNSEL OF RECORD
GERALDINE SOAT BROWN
MILLER, SHAKMAN, HAMILTON,
KURTZON & SCHLIFKE
208 SOUTH LASALLE STREET
SUITE 1100
CHICAGO, ILLINOIS 60604
TELEPHONE: (312) 263-3700
FACSIMILE: (312) 263-3270

Attorneys for Respondent

February 19, 1997

16 pp

QUESTION PRESENTED FOR REVIEW IF PETITION FOR WRIT OF CERTIORARI WERE GRANTED

Were this Court to grant petitioner's Petition For Writ Of Certiorari only one question would be presented for review: Did counsel for the principal and its surety in this case, in correspondence with petitioner's counsel, agree that the surety waived previously-made objections to arbitration, waived its right to appeal, and would be bound to an arbitration award even if vacated on appeal and therefore not binding on the principal?

RULE 29.6 STATEMENT

Respondent Federal Insurance Company's parent company is Chubb & Son, Inc; Federal has no non-wholly owned subsidiaries.

TABLE OF CONTENTS

QUESTION PRESENTED FOR REVIEW IF PETITION FOR WRIT OF CERTIORARI WERE GRANTED i

RULE 29.6 STATEMENT ii

TABLE OF CONTENTS iii

TABLE OF AUTHORITIES iv

STATEMENT OF THE CASE 1

A. The Underlying Action And Vemco's Contention Against The Surety Federal 1

B. The Facts As To The Surety Federal 2

ARGUMENT - REASONS FOR DENYING THE WRIT 7

I. The Petition Misstates The Question Presented 8

II. There Is No Reason For Review On Certiorari 10

CONCLUSION 11

TABLE OF AUTHORITIES

Statutes and Rules

9 U.S.C. §§2 and 10 11

S. Ct. Rule 10(a) 10

S. Ct. Rule 10(c) 10

STATEMENT OF THE CASE

A. The Underlying Action And Vemco's Contention Against The Surety Federal

In this action, the United States Court of Appeals for the Sixth Circuit ("Sixth Circuit"), in an unreported decision, vacated an arbitration award that had been entered in favor of Vemco, Inc. ("Vemco") and against Flakt, Inc. ("Flakt") and Flakt's surety on a performance bond, Federal Insurance Company ("Federal"). The underlying disputes arose under a contract pursuant to which Flakt was to design, fabricate and install in Vemco's plant a paint finishing system to paint automotive parts. [R.8 Exs. 1, 50 to Counterclaim.][1/]

The district court, at Vemco's urging and over Flakt and Federal's objection, had ruled that all contract disputes were subject to arbitration under the terms of the Vemco-Flakt contract. [App. D-29.] The Sixth Circuit disagreed, ruling that [App. A-11]:

> [A]lthough the parties' agreement contains several arbitration clauses, none is so broad as to support the construction urged by plaintiff, i.e., that the parties agreed to submit to arbitration all of their disputes.

Vemco is not challenging this decision, and the case is back before the district court to proceed in accordance with the Sixth Circuit's decision.

1/ As used herein, "R." refers to the record on appeal in the Sixth Circuit. "App." refers to the Appendix attached to Vemco's Petition For Writ Of Certiorari ("Petition" or "Pet.").

The sole issue that Vemco is raising in its Petition pertains only to the surety Federal. Vemco contends that, in a series of letters exchanged with counsel for Vemco, the attorney who represented both Flakt and Federal waived the objections Federal had previously made to the arbitration, waived Federal's right to appeal, and agreed that Federal would be bound by the arbitration award even if vacated on appeal as to Federal's principal Flakt.

This issue was hardly touched upon below. Vemco devoted three pages of its 46-page brief in the Sixth Circuit to the issue; the Sixth Circuit devoted to it only one paragraph of its unreported opinion.

B. The Facts As To The Surety Federal

On August 1, 1988, Vemco made an arbitration demand on both Flakt and Federal. [R.1 Ex. C to Verified Complaint [Etc.].] On September 8, 1988, Vemco filed this action against Flakt [R.1], and on September 9 Vemco obtained a temporary restraining order ("TRO") ordering Flakt, *inter alia*, to proceed with the arbitration proceeding [R.5; App. C-19].

On September 27, 1988, Flakt and Federal filed a counterclaim against Vemco which, *inter alia*, sought a stay of arbitration and an order determining the scope of arbitration. [R.8 Counterclaim at 38-42.] Flakt and Federal alleged that, "[t]here are a number of disputes in

this case which are not within the scope of the arbitration." [*Id.* ¶193 at 40.][2/]

On October 18, 1988, Flakt and Federal filed a Motion For Order Determining And Staying Arbitrable Claims in which they argued that [R.15 Motion at 5-6, ¶14]:

> The Agreement contains very narrow and limited arbitration provisions, which apply to few, if any, of the disputes or claims between Flakt and Vemco . . . .

The district court ruled on Flakt and Federal's motion by order dated March 22 and entered March 23, 1989. [App. D.] It rejected Flakt and Federal's position that the contract's arbitration provisions were narrow and limited, agreed with Vemco that all contract claims were subject to arbitration, and referred all contract claims to arbitration. [App. D-29, D-31.][3/]

[2/] Vemco states that by filing the counterclaim with Flakt "Federal appeared in the litigation picture," Pet. 8; Vemco fails to advise the Court that it had made its arbitration demand on both Flakt and Federal.

[3/] It is not true, as Vemco states, that the effect of the district court's March 23, 1989 order was "leaving intact its September 9, 1988 order mandating Flakt to arbitrate," Pet. 8 (Vemco's emphasis), or that the district court "purportedly ordered Federal to participate in Arbitration," Pet. 19.

(continued...)

Notwithstanding the district court's ruling, Vemco's counsel was concerned about Federal's status in the arbitration because Federal's construction bond had no arbitration clause. [Pet. 9.] In an exchange of correspondence commencing one week after the district court's ruling, Vemco's counsel urged counsel for Flakt and Federal to agree that Federal submit to the arbitration. [App. G.] In response, counsel for Flakt and Federal pointed out that Federal "does not even need to be named

---

[3/](...continued)

The March 23, 1989 order defined for the first time the *scope* of the arbitration, something that was not done in the September 9, 1988 TRO. And the district court *actually*, not "purportedly," directed its March 23, 1989 order to all three parties, including Federal. The district court first stated that, "Flakt and Federal Insurance Co. *will be jointly referred to as 'Flakt.'*" [App. D-22, n.1. (emphasis added)] The district court then explained that [App. D-29 (footnote omitted)]:

> Flakt contends that the only arbitrable claims are those that involve a determination of the costs of extras not approved by Vemco and those that arise from the drawings and specificaitons. Vemco, on the other hand, contends that the arbitration provisions cover all the disputes which arise from the contract. . . . The Court agrees with Vemco and finds that the arbitration provisions cover all disputes which arise from the contract.

The district court referred those claims to arbitration. [App. D-31.]

in the arbitration proceeding." [App. G-56.] Federal, as surety, would be liable on the bond if Flakt were found liable, whether or not Federal was a party. Also, Flakt, as principal, was obligated to indemnify Federal, the surety. [*See* App. G-55 - G-56.] Since Federal's legal position was the same whether or not a party to the arbitration, counsel for Flakt and Federal ultimately agreed that Federal would "participate in and be bound by the . . . arbitration proceedings." [App. G-63.]

Nothing in the correspondence exchanged between counsel states that Federal was waiving the position it had just taken in the district court that the arbitration provisions "apply to few, if any, of the disputes or claims between Flakt and Vemco." [R.15 Motion at 5-6, ¶14.] Nothing in that correspondence states that Federal was waiving its right to appeal from the district court's order rejecting that position. Nor does the correspondence state that Federal was agreeing to be bound by an arbitration award that was reversed on appeal as to its principal, Flakt.

Vemco summed up in its motion to confirm the arbitration award what Federal had agreed to when Vemco told the district court that [App. J-146, ¶11 (emphasis added)]:

> Federal specifically agreed to be bound by the arbitration proceedings *as to those matters which were to be arbitrated.*

Federal did *not* agree to be bound as to matters which the Sixth Circuit ruled were *not* to be arbitrated. Nor did Federal agree to be bound by an arbitration award which, because vacated on appeal, would not bind its principal, Flakt. As Vemco told the arbitrators three years after the

exchange of letters between counsel, "[t]he surety's liability is coextensive with the principal's liability." [R.255 Ex. A to Flakt, Inc's Motion To Vacate Arbitration Award at 19.][4/]

Notwithstanding what it had told the district court and the arbitrators, Vemco argued in the Sixth Circuit that the surety Federal had waived its right to appeal and was liable for the arbitration award even if the award were reversed

---

4/ Vemco's statement that "Federal had not filed a motion challenging the arbitration award," Pet. 12, is wholly misleading. The initial arbitration award, made on June 15, 1993, named only Flakt as a respondent. [R.252 Ex. E to Vemco's Motion For Confirmation [Etc.].] Therefore, only Flakt moved to vacate the award. [R.255.] Flakt moved on the same ground that it had unsuccessfully asserted prior to the district court's referring all contract claims to arbitration, that the "Arbitration Clauses . . . do not authorize arbitration of many of the disputes submitted to and decided by the Arbitrators." [R.255 Flakt, Inc.'s Brief [Etc.] at 8.]

While Flakt moved to vacate the arbitration award, Vemco moved for judgment confirming the arbitration award against both Flakt and Federal [App. J], and both Flakt and Federal opposed that motion [App. K]. In their opposition to that motion, both Flakt and Federal adopted the position taken by Flakt in Flakt's motion to vacate. [R.254 Brief In support Of Response [Etc.] at v-vi and 3.]

On September 1, 1993, the arbitrators amended their award to add Federal as a respondent. [R.260 Ex. B to Vemco's Reply [Etc.] at 2.]

as to its principal Flakt. The Sixth Circuit disposed of that argument in one paragraph, stating that [App. A-14]:

> Finally, and contrary to plaintiff's assertions, defendant and its surety Federal did not waive their right to appeal by arguing their claims before the arbitration panel. Defendant and Federal requested a determination of arbitrable issues in the district court. They then abided by the district court's determination that all but two issues were arbitrable. "This is not a situation where [parties] consented to arbitration and are now seeking a second bite at the apple." *Wiepking [v. Prudential-Bache Sec., Inc.],* 940 F.2d [996,] at 999 [(6th Cir. 1991)].

ARGUMENT

REASONS FOR DENYING THE WRIT

Vemco seeks to hold a surety liable for an arbitration award vacated against its principal. Vemco seeks this result on the basis of a series of letters between lawyers. The question presented is nothing more than how to interpret those letters. The decision below implicates no federal policy and contradicts no ruling of this Court or of any of the courts of appeals. The Petition should be denied.

I. The Petition Misstates The Question Presented

This case does not present the question set out at page (i) of Vemco's Petition. No question is presented in this case regarding the validity, irrevocability or enforceability of a surety's agreement to submit a controversy to arbitration. No such question was posed to or addressed by either the district court or the Sixth Circuit.

The only question in this case is what the attorney for Flakt and Federal agreed to in his correspondence with Vemco's counsel. Did he agree that Federal would be bound, as its principal Flakt would be bound, by a final, enforceable arbitration award? Or did he agree that Federal waived the objections it had raised to arbitration in the district court, waived its right to appeal, and would be bound by an arbitration award even if it were reversed on appeal and not binding on its principal?

It is simply not true that, as Vemco states at Pet. 14, "the Court of Appeals necessarily decided that Federal's . . . Agreement . . . was not enforceable under the Federal Arbitration Act." *See also* Pet. 30. The Sixth Circuit decided no such thing. It is just that the agreement reached in correspondence between counsel was not what Vemco now says it was.

Vemco contends that the attorney for Flakt and Federal waived Federal's objection to the scope of the arbitration, waived Federal's right to appeal and agreed that Federal would be bound by an arbitration award that was erroneous as a matter of law and that therefore did not bind its principal, Flakt. That contention is farfetched, makes

no sense, and clearly was not the understanding of the parties.[5/]

[5/] Contrary to the apparent suggestion at Petition 5, 12 and 16, n.4, the district court did *not* indicate that it agreed with the position Vemco is now taking. Having erroneously concluded that the arbitration award was valid and binding on Flakt, the district court ruled that it was also binding on Federal. The district court did *not* suggest that an erroneous award vacated as to Flakt would still be binding on Federal.

There is no conceivable reason why the attorney for Flakt and Federal would voluntarily agree that the surety Federal would be bound by an arbitration award that did not bind the principal Flakt. By voluntarily expanding the scope of Federal's potential liability beyond that of its principal, the attorney would be running the risk that Federal would lose its right to be indemnified by its principal. On the other hand, if Federal did not lose its right to be indemnified, increasing the scope of Federal's potential liability would also increase the scope of Flakt's potential liability.

Contrary to Petition at 21, Vemco gave Federal no consideration for Federal's allegedly agreeing to be bound by an arbitration award expanding its potential liability beyond its performance bond. Refraining from amending its pleadings to seek relief from Federal is no consideration when Federal was already a party to the action and a party to the district court's order submitting all contract issues to arbitration.

Vemco was right when it told the district court and the arbitrators that Federal had agreed to arbitration "as to those matters which were to be arbitrated" and that "[t]he surety's liability is coextensive with the principal's liability." *See* pages 5-6 above. Vemco is wrong in the contrary position it took in the Sixth Circuit and is taking in the Petition.

More important, Vemco's contention raises nothing more than a question as to how correspondence between counsel in this case should be construed. That is not a question that warrants review on certiorari.

II. There Is No Reason For Review On Certiorari

Because Vemco's Petition raises nothing more than a fact-specific question of how correspondence between counsel should be construed, it does not present a question that is appropriate for review on a writ of certiorari.

The Sixth Circuit's decision in this case does not conflict with another United States court of appeals or a state court of last resort; nor does it call for the exercise of this Court's supervisory power. *See* S. Ct. Rule 10(a). Vemco does not claim to the contrary.

Following the language of Supreme Court Rule 10(c), Vemco states that the supposed error by the Court of Appeals "presents an important question of federal law that has not been, but should be, settled by this Court." [Pet. 7.] But Vemco fails to state what the question is or in what manner it is unsettled. In fact, Vemco's Petition raises no question of federal law of any kind.

In its Petition, Vemco cites seven decisions of this Court and Sections 2 and 10 of the Federal Arbitration Act, 9 U.S.C. §§2 and 10; none of those decisions or sections are relevant to the issue raised in the Petition, and none were cited in the three pages that Vemco devoted to the issue in its Sixth Circuit brief. Vemco also relies on an apparently unpublished paper on general indemnity agreements. *See* Petition 15 and App. I. That paper does not deal with federal law, agreements to arbitrate or purported waivers of objections to arbitration; in no way does it support Vemco's request for review.

There is not even an arguable basis for reviewing the Sixth Circuit's ruling on certiorari.

CONCLUSION

For the reasons stated above, we respectfully request the Court to deny the Petition.

Dated: February 19, 1997

Respectfully submitted,

R. DICKEY HAMILTON
COUNSEL OF RECORD
GERALDINE SOAT BROWN
MILLER, SHAKMAN, HAMILTON,
KURTZON & SCHLIFKE
208 SOUTH LASALLE STREET
SUITE 1100
CHICAGO, ILLINOIS 60604
(312) 263-3700
Attorneys for Respondent